

4 LATIFA ISAKHANOVA,  
5 Plaintiff,

6

7 WILLIAM L. MUNIZ, et al.,  
8 Defendants.

Case No. 15-cv-03759-TEH

## **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

10        This matter came before the Court on January 11, 2016 for a hearing on  
11      Defendants' Motion to Dismiss. Docket No. 15. After carefully considering the parties'  
12      written and oral arguments, the Court hereby GRANTS Defendants' motion, for the  
13      reasons set forth below.

15 | BACKGROUND

16 The First Amended Complaint (“FAC”) alleges that on August 18, 2013, Latifa  
17 Isakhanova (“Plaintiff”) arrived at Salinas Valley State Prison (“SVSP”) to visit her son,  
18 who is an inmate there. FAC ¶ 26 (Docket No. 9). At some point prior to this visit,  
19 Plaintiff’s son had “signed two prison group grievances and two inmate group appeals  
20 challenging SVSP’s interference with the religious practices of Muslim inmates.” *Id.* ¶ 32.

At the outset, Plaintiff's son was brought into the visiting room so the two could share a "contact visit." *Id.* ¶ 26. Sometime after the visit began, a correctional officer removed Plaintiff's son from the visiting room. *Id.* Later, a correctional officer returned and handcuffed Plaintiff (*id.* ¶ 27),<sup>1</sup> purportedly because the guards suspected that she had passed a "bindle of tobacco" to her son during their visit (*id.* ¶¶ 3, 29).

<sup>1</sup> Plaintiff alleges that “Doe 1” is the officer who handcuffed her. *Id.* ¶ 27.

1           Ultimately, SVSP officers detained Plaintiff for a period of seven to eight hours (*id.*  
 2 ¶ 27),<sup>2</sup> during which time they strip searched her (*id.* ¶¶ 33-34),<sup>3</sup> searched her car and  
 3 phone against her will and without a warrant (*id.* ¶¶ 36, 38-39),<sup>4</sup> made offensive and  
 4 derogatory remarks about her religion (Islam) and her foreign national origin (she is a  
 5 nationalized U.S. citizen who immigrated from Azerbaijan) (*id.* ¶ 31),<sup>5</sup> and denied her  
 6 access to her diabetes medication, food, and water (*id.* ¶¶ 35, 37).<sup>6</sup>

7           When they finally released Plaintiff, prison officials “threatened [] that if she  
 8 complained about her mistreatment, false arrest and unlawful searches, she would never  
 9 see her son again.” *Id.* ¶ 41.<sup>7</sup> Following this incident, SVSP suspended Plaintiff’s  
 10 visitation rights for one year, allegedly for passing chewing tobacco to her son and for  
 11 having unlawful text message communications with her son, but Plaintiff denies the  
 12 veracity of both of these allegations. *Id.* ¶¶ 39-40, 43.<sup>8</sup> SVSP denied Plaintiff’s appeals of  
 13 this suspension and her reapplication for visitation rights for nearly two years,<sup>9</sup> and  
 14 reinstated Plaintiff’s visitation rights only after this lawsuit was filed. *Id.* ¶ 47.

15           On the basis of these allegations, Plaintiff brings three causes of action: two 42  
 16 U.S.C. § 1983 (“Section 1983”) causes of action under the Fourth Amendment, for  
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18           <sup>2</sup> Plaintiff alleges that “Does 1-50” were responsible for the seven- to eight-hour  
 19 detention. *Id.* ¶¶ 27-29.

20           <sup>3</sup> Plaintiff alleges that Defendant officers Hyde, Alonzo, and “Does 6-7” participated  
 21 in the strip search. *Id.* ¶ 33. The officers “took [Plaintiff] to a bathroom and ordered her to  
 22 unbutton her shirt, rearrange her bra, and pull down her pants and undergarments for a  
 23 visual inspection of her genitals and anus.” *Id.* No contraband was found. *Id.* ¶ 34.

24           <sup>4</sup> Plaintiff alleges that “Does 1-50” threatened her and demanded that she consent to  
 25 the warrantless searches of her phone and car. *Id.* ¶¶ 36, 38-39. Plaintiff consented to the  
 26 searches only under duress, because Defendants threatened Plaintiff with criminal  
 27 prosecution and overnight detention if she resisted the searches. *Id.*

28           <sup>5</sup> Plaintiff alleges that “Does 1-50” made the offensive and derogatory statements  
 29 listed in the FAC. *Id.* ¶ 31.

<sup>6</sup> Plaintiff alleges that “Does 1-50” were responsible for depriving her of medication,  
 29 food, and water. *Id.* ¶ 35.

<sup>7</sup> Plaintiff alleges that “Does 1-50” threatened her not to report any of this  
 29 mistreatment. *Id.* ¶ 41.

<sup>8</sup> Plaintiff alleges that the “letter” connected to this visitation suspension was written  
 29 by Defendant Grounds, and that the corresponding “notice” was prepared by Defendant  
 29 Alvarado. *Id.* ¶¶ 43-44.

<sup>9</sup> Plaintiff alleges that Defendants, including Muniz and Segura, denied her  
 29 reapplications for visitation rights. *Id.* ¶ 46.

1 unlawful seizure (*id.* ¶¶ 51-54) and unlawful search (*id.* ¶¶ 55-60); and a third cause of  
2 action under the First and Fourteenth Amendments (*id.* ¶¶ 61-66). This third cause of  
3 action actually alleges the violation of five separate constitutional rights: Fourteenth  
4 Amendment right to equal protection (*id.* ¶ 62); First Amendment right to free exercise of  
5 religion (*id.* ¶ 63); First Amendment right to petition the government (*id.* ¶ 64); First  
6 Amendment right to free speech without retaliation (*id.* ¶ 65); and Fourteenth Amendment  
7 right to familial association (*id.* ¶ 66). In total, then, Plaintiff alleges seven separate  
8 constitutional violations.<sup>10</sup>

9 All three causes of action are brought against all thirteen individual Defendants:  
10 Jeffrey A. Beard; W. Muniz; R. Alvarado; J. DeAnzo; G. Segura; A. Lyons; R. Grounds;  
11 M. Alonso; C. Wilson; A. Lopez; [FNU] Hyde; L. Reyes; and A. Ibanez.<sup>11</sup> All Defendants  
12 are sued in their individual capacities except Defendant Beard – the Secretary of the  
13 California Department of Corrections and Rehabilitation (“CDCR”) – who is “sued as a  
14 defendant in his official capacity only for purposes of injunctive relief.” *Id.* ¶ 15.

15

## 16 **LEGAL STANDARD**

17 Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6) when a  
18 plaintiff’s allegations fail “to state a claim upon which relief can be granted.” To survive a  
19 motion to dismiss, a plaintiff must plead “enough facts to state a claim to relief that is  
20 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 547, 570 (2007). “The  
21 plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a  
22 sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
23 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that  
24 allows the court to draw the reasonable inference that the defendant is liable for the

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26<sup>10</sup> Should Plaintiff elect to further amend the FAC, the Court requests that she allege  
27 every separate constitutional violation as a separate cause of action.

28<sup>11</sup> The Attorney General’s Office does not represent Defendant Officers Hyde, Reyes,  
and Ibanez, but brings this motion to dismiss on behalf of the remaining ten individual  
Defendants. Reply in Supp. of Defs.’ Mot. to Dismiss (“Reply”) at 1 n.1 (Docket No. 19).

1 misconduct alleged.” *Id.* Such a showing “requires more than labels and conclusions, and  
2 a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S.  
3 at 545, 555.

4 In ruling on a motion to dismiss, a court must “accept all material allegations of fact  
5 as true and construe the complaint in a light most favorable to the non-moving party.”  
6 *Vasquez v. L.A. Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007). Courts are not, however,  
7 “bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556  
8 U.S. at 678 (citation omitted). Any dismissal should be with leave to amend, unless it is  
9 clear that amendment could not possibly cure the complaint’s deficiencies. *Steckman v.*  
10 *Hart Brewing, Inc.*, 143 F.3d 1293, 1296, 1298 (9th Cir. 1998).

11

## 12 DISCUSSION

13 All three of Plaintiff’s claims arise under Section 1983, which provides:

14 Every person who, under color of any statute, ordinance,  
15 regulation, custom, or usage, of any State . . . subjects, or  
16 causes to be subjected, any citizen of the United States or  
17 other person within the jurisdiction thereof to the deprivation  
of any rights, privileges, or immunities secured by the  
Constitution and laws, shall be liable to the party injured . . . .

18 To state a claim under Section 1983, the complaint must show: “(1) that a person acting  
19 under color of state law committed the conduct at issue, and (2) that the conduct deprived  
20 the claimant of some right, privilege, or immunity protected by the Constitution or laws of  
21 the United States.” *Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988). “A person  
22 deprives another ‘of a constitutional right, within the meaning of section 1983, if he does  
23 an affirmative act, participates in another’s affirmative acts, or omits to perform an act  
24 which he is legally required to do that causes the deprivation of which [the plaintiff  
25 complains].’” *Id.* (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)).

26 Defendants present six reasons that Plaintiff’s Section 1983 claims should be  
27 dismissed, either entirely or as to certain Defendants. Defs.’ Mot. to Dismiss (“Mot.”) at  
28 4-5. The Court addresses each reason in turn below, granting Defendants’ motion to

1 dismiss as to each Defendant and cause of action implicated by each argument.

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3 **I. Defendant Beard must be dismissed for failure to properly plead**  
4 **“official capacity” liability under Section 1983.**

5 First, Defendants argue that “Plaintiff’s official capacity claim against Defendant  
6 Beard must be dismissed” for failure to plead that an official policy or custom motivated  
7 Defendants’ conduct. Mot. at 5. Plaintiff responds that Secretary Beard is named “in his  
8 official capacity for purposes of obtaining injunctive relief,” and that the claim against him  
9 is proper under the doctrine of *Ex parte Young*. Opp’n to Defs.’ Mot. to Dismiss  
10 (“Opp’n”) at 6; FAC ¶ 15.

11 Generally, the Eleventh Amendment serves as a jurisdictional bar to suits brought  
12 by private parties against a state or state agency, including actions against a state Board of  
13 Corrections. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (“[S]uit against the State and  
14 its Board of Corrections is barred by the Eleventh Amendment.”). Because “[s]uits against  
15 state officials in their official capacity [] should be treated as suits against the State,” the  
16 Eleventh Amendment also prohibits suits against a state official in his or her “official  
17 capacity” for *monetary* relief. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). This prohibition,  
18 however, does not apply to “official capacity” suits for *injunctive* relief. *Verizon Md., Inc., v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002). But more is required of an  
19 “official capacity” claim under Section 1983 than an “individual capacity” claim:  
20 “Because the real party in interest in an official-capacity suit is the governmental entity  
21 and not the named official, ‘the entity’s ‘policy or custom’ must have played a part in the  
22 violation of federal law.’ ” *Hafer*, 502 U.S. at 25 (quoting *Kentucky v. Graham*, 473 U.S.  
23 159, 166 (1985)).

25 Plaintiff may therefore proceed against CDCR Secretary Beard in his official  
26 capacity only for the purposes of injunctive relief and only if a CDCR “policy or custom”  
27 played a roll in any constitutional violations suffered by Plaintiff. But as Defendants  
28 correctly point out, the FAC “fails to identify an official policy or custom for which

1 Defendant Beard is responsible, much less a policy or custom which resulted in the alleged  
2 constitutional harms suffered by Plaintiff.” Mot. at 6. Rather, the FAC states only that  
3 “Plaintiff seeks injunctive relief against Secretary Beard to correct and prevent the practice  
4 of CDCR officials’ abusing the laws under which CDCR may restrict visitation privileges.”  
5 Opp’n at 7. And when asked at the January 11, 2016 hearing whether Plaintiff would have  
6 any additional factual allegations of a “policy or custom” to add upon further amendment  
7 of the FAC, counsel for Plaintiff conceded that Plaintiff’s claims are not predicated upon  
8 any policy or custom.

9 Accordingly, the Court hereby GRANTS Defendants’ motion to dismiss all claims  
10 as against CDCR Secretary Beard in his official capacity. Because Plaintiff has conceded  
11 that she would have no additional factual allegations to include upon further amendment  
12 of the FAC, it is clear that amendment would not cure this defect (*Steckman*, 143 F.3d at  
13 1296), and dismissal shall therefore be WITH PREJUDICE.

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15 **II. Defendants Lopez, Wilson, and DeAnzo must be dismissed because the**  
16 **FAC fails to make any allegations regarding their conduct.**

17 Second, Defendants argue that because the FAC “is completely devoid of any  
18 specific factual allegations involving Defendant[s] Wilson, Lopez, and De Anza [sic],”  
19 these three Defendants should be dismissed entirely. Mot. at 6.

20 As Plaintiff correctly points out (Opp’n at 3-4), it is certainly true that “where the  
21 identity of the alleged defendant is not known prior to the filing of a complaint, the  
22 plaintiff should be given an opportunity through discovery to identify the unknown  
23 defendants, unless it is clear that discovery would not uncover the identities, or that the  
24 complaint would be dismissed on other grounds.” *Wakefield v. Thompson*, 177 F.3d 1160,  
25 1163 (9th Cir. 1999) (internal quotation marks, citation, and alterations omitted). But the  
26 issue presented here is somewhat different; rather than arguing that “Doe pleading” is  
27 improper, Defendants challenge the practice of naming individuals in a complaint without  
28 tying those individuals to the specific conduct alleged therein. Mot. at 6.

1 To that end, the FAC references Defendants Wilson, Lopez, and DeAnzo only in  
2 the “Parties” section, and alleges only that Defendant Lopez “participated in the unlawful  
3 search and seizure of Plaintiff” (FAC ¶ 10),<sup>12</sup> and that Defendants Wilson and DeAnzo  
4 “directly participated in the unlawful search and seizure and other violations of plaintiff’s  
5 rights” (*id.* ¶¶ 16-17). These three Defendants are not mentioned again in either the FAC’s  
6 “Factual Allegations” or anywhere within the three causes of action. So the question is  
7 whether the general allegations regarding Defendants Wilson’s, Lopez’s, and DeAnzo’s  
8 “participation” suffice to state a claim against these three individuals.

9 Another court in this circuit recently addressed this issue in the context of similarly  
10 vague allegations. In *DeLuca v. County of Los Angeles*, No. 15-00344, 2015 WL 4451420  
11 (C.D. Cal. July 20, 2015), the plaintiff made specific allegations of an unconstitutional  
12 search and seizure,<sup>13</sup> but alleged only generally that each of the six named defendants  
13 “participated directly” in the unlawful conduct, without tying any of them to specific acts.  
14 2015 WL 4451420, at \*4. And the *DeLuca* court held that such pleading was insufficient  
15 because it was “not plausible that each [defendant] engaged in the same alleged conduct.”  
16 *Id.* The court noted that if, for example, “the identity of the person or persons who  
17 handcuffed [plaintiff] is unknown,” it would be more appropriate for that fact to be  
18 “expressed in the complaint, and upon learning of the parties involved, [plaintiff] can seek  
19 to amend the complaint.” *Id.*

20 The Plaintiff in this case argues, to the contrary, that “[a] complaint may assert  
21 allegations against multiple individuals in a group that participated in constitutional  
22 violations even though the plaintiff cannot identify with precision which individual was  
23 responsible for which act.” Opp’n at 3. Plaintiff cites *Hughey v. Camacho*, 2015 U.S.  
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25 <sup>12</sup> Though the FAC also alleges that Defendant Lopez was “supervisor in charge of the  
26 visiting room at SVSP on the day of the incident” (FAC ¶ 10), Plaintiff’s counsel  
27 explained at the January 11, 2016 hearing that Defendant Lopez’s liability is not based  
upon supervisory liability alone, but on his or her direct participation in the alleged  
constitutional violations.

28 <sup>13</sup> The *DeLuca* plaintiff’s allegations included that sheriff’s deputies broke down her  
bedroom door, handcuffed her, and detained her for up to thirty minutes, all in violation of  
her Fourth Amendment rights. 2015 WL 4451420, at \*2.

1 Dist. LEXIS 113473 (E.D. Cal. Aug. 24, 2015) to support this argument. There, the court  
2 upheld a Section 1983–Fourth Amendment claim against “eight responding officers,”  
3 despite the fact that the complaint did not specify which unlawful acts were performed by  
4 which officers. 2015 U.S. Dist. LEXIS 113473, at \*23-30. Indeed, the court held that  
5 “[f]or the purposes of this motion to dismiss, Plaintiffs are not required to know which of  
6 the eight officers performed every act throughout the altercation.” *Id.* at \*10-11.

7 Importantly, however, the defendants in *Hughey* did not dispute that the eight  
8 officers named in the complaint were present during the altercation that gave rise to the  
9 constitutional harms alleged therein. *Id.* at \*11. Here, on the other hand, Defendants have  
10 not conceded that all twelve of the Defendants sued in their individual capacities were  
11 present during each of Plaintiff’s alleged constitutional violations. Moreover, as was the  
12 case in *DeLuca*, it is simply not “facially plausible” that all twelve Defendants participated  
13 individually in the various harms that befell Plaintiff, which spanned several locations and  
14 lasted seven to eight hours. 2015 WL 4451420, at \*4; *Iqbal*, 556 U.S. at 678. It is not  
15 plausible, for example, that all twelve Defendants searched her phone, all twelve  
16 Defendants exited SVSP to search her car, and all twelve Defendants uttered the nine  
17 offensive statements alleged in the FAC. Accordingly, as in *DeLuca*, it would be more  
18 appropriate for Plaintiff to admit that she is not yet able to tie each Defendant to their  
19 unlawful conduct, proceed on a “Doe pleading,” and amend the complaint to add  
20 Defendants once discovery clarifies their role in the abuse she suffered.<sup>14</sup>

21 Without any factual allegations to otherwise tie Defendants Wilson, Lopez, and  
22 DeAnzo to any of the seven constitutional violations that Plaintiff alleges, Plaintiff has  
23 therefore failed to plausibly state a claim that they “[did] an affirmative act, participate[d]

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25 <sup>14</sup> This holding should in no way be read as barring a later argument by Plaintiff that  
26 certain Defendants are liable “even if they did not directly engage in the unconstitutional  
27 conduct themselves,” on an “integral participant” theory. *See Hopkins v. Bonvicino*, 573  
28 F.3d 752, 770 (9th Cir. 2009). But in the meantime, without more specificity regarding  
which Defendants were even aware of which constitutional violations, it would be  
improper to uphold all seven claims against all twelve Defendants on the basis of general  
allegations of “participation” alone.

1 in another's affirmative acts, or omit[ted] to perform an act which [they were] legally  
2 required to do." *Leer*, 844 F.2d at 633 (citation omitted). Accordingly, Defendants'  
3 motion to dismiss all claims as against Defendants Wilson, Lopez, and DeAnzo is hereby  
4 GRANTED. But because this defect will almost certainly be cured with discovery and  
5 subsequent amendment, dismissal shall be WITHOUT PREJUDICE. *Steckman*, 143 F.3d  
6 at 1296.

III. The Fourth Amendment claim for unlawful search must be dismissed except as against Defendants Alonzo, Lyons, and the Does, for failure to make any allegations regarding any other Defendant's conduct.

11        Third, Defendants argue that Plaintiff's second cause of action – a Fourth  
12      Amendment claim for unlawful search – should be dismissed as against all Defendants  
13      other than Defendants Alonzo and Lyons. Mot. at 7.

14 The FAC alleges that Defendants Alonzo, Lyons, and Does 6-7 conducted the strip  
15 search of Plaintiff, namely, that they “took [Plaintiff] to a bathroom and ordered her to  
16 unbutton her shirt, rearrange her bra, and pull down her pants and undergarments for a  
17 visual inspection of her genitals and anus.” FAC ¶ 33. But the Defendants are correct that  
18 Plaintiff does not identify any other specific Defendant who participated in either the strip  
19 search or the searches of Plaintiff’s cell phone and car. *See id.* ¶ 36 (“Defendants . . .  
20 demanded that [Plaintiff] consent to a search of her locked car.”); *id.* ¶ 38 (“Defendants . . .  
21 demanded that [Plaintiff] consent to a search of her mobile telephone.”). And for the  
22 reasons set forth in Section II above, such general allegations are insufficient to state a  
23 claim that all twelve Defendants named in their individual capacities participated at every  
24 step of Plaintiff’s seven- to eight-hour ordeal, including the search of her body, phone, and  
25 car (which presumably all took place in different locations). Because the FAC makes  
26 specific search allegations as to only the participation of Defendants Alonzo and Lyons,  
27 Plaintiff has therefore failed to state a Fourth Amendment claim for unlawful search as to  
28 all named Defendants except Alonzo and Lyons.

1           Accordingly, Defendants' motion to dismiss the second cause of action – for  
 2 violation of the Fourth Amendment through unlawful search – is hereby GRANTED as to  
 3 all Defendants except Defendants Alonzo, Lyons, and the Does.<sup>15</sup> But because this defect  
 4 will almost certainly be cured with discovery and subsequent amendment, dismissal shall  
 5 be WITHOUT PREJUDICE. *Steckman*, 143 F.3d at 1296.

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7           **IV. The Fourth Amendment claim for unlawful seizure, First Amendment  
 8 claims for free-exercise and retaliation, and Fourteenth Amendment  
 9 claim for equal protection must be dismissed except as to the Does, for  
 10 failure to make any allegations regarding any Defendant's conduct.**

11           Fourth, Defendants argue that Plaintiff's "Fourth Amendment . . . claim for  
 12 unlawful arrest," "claims based on violations of her free-exercise rights under the First  
 13 Amendment," "claim for First Amendment retaliation," and "claims under the Fourteenth  
 14 Amendment for violations of equal protection" must likewise be dismissed for failure to  
 15 make any assertions against specific Defendants. Mot. at 7-8.<sup>16</sup>

16           Defendants are correct that the FAC does not contain any assertions against a  
 17 specific Defendant for any of these claims. *See, e.g.*, FAC ¶ 27 (alleging "Doe 1"  
 18 handcuffed Plaintiff); *id.* ¶ 28 (alleging "Defendants (including Does 1-50)" told Plaintiff  
 19 "she was not free to leave"); *id.* ¶ 31 (alleging "Does 1-50" made the offensive and  
 20 derogatory comments to Plaintiff); *id.* ¶ 41 (alleging "Does 1-50" threatened Plaintiff not  
 21 to report any of this mistreatment). And for the reasons set forth in Section II above,  
 22 general allegations are insufficient to state a claim against the twelve Defendants named in  
 23 their individual capacities, as it is not plausible that all twelve participated in every one of

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 25           <sup>15</sup> As discussed in Section II above, "Doe pleading" is accepted in this circuit.  
 26 *Wakefield*, 177 F.3d at 1163.

27           <sup>16</sup> Defendants do not challenge Plaintiff's claim based on her Fourteenth Amendment  
 28 right to familial association (FAC ¶ 66) for failure to make any assertions against specific  
 Defendants. And for good reason: Plaintiff does specifically allege that the "letter"  
 connected to her visitation suspension was written by Defendant Grounds (*id.* ¶ 43), that  
 the corresponding "notice" was prepared by Defendant Alvarado (*id.* ¶ 44), and that  
 Defendants Muniz and Segura denied her reapplications for visitation rights (*id.* ¶ 46).

1 these constitutional violations. Plaintiff has therefore failed to state the Fourth  
 2 Amendment claim for unlawful arrest (first cause of action), First Amendment free-  
 3 exercise claim (*id.* ¶ 63), First Amendment retaliation claims (*id.* ¶¶ 64, 65), and  
 4 Fourteenth Amendment equal protection claim (*id.* ¶ 62) against any of the named  
 5 Defendants. Accordingly, Defendants' motion to dismiss these claims is hereby  
 6 GRANTED as to all Defendants except the Does.<sup>17</sup> But because this defect will almost  
 7 certainly be cured with discovery and subsequent amendment, dismissal shall be  
 8 WITHOUT PREJUDICE. *Steckman*, 143 F.3d at 1296.

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10 **V. The First Amendment claim for retaliation based on Plaintiff's son's  
 11 conduct must be dismissed for failure to state a claim.**

12 Fifth, Defendants argue that Plaintiff failed to state her First Amendment claim for  
 13 retaliation, which is predicated upon the two prison grievances her son filed sometime  
 14 before she visited him on August 18, 2013. Mot. at 8-9; FAC ¶ 32. Defendants argue that  
 15 the claim fails because Plaintiff lacks standing to sue *on behalf of her son*. Mot. at 8-9.

16 To state a third-party claim, "three important criteria [must be] satisfied: The litigant  
 17 must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete  
 18 interest' in the outcome of the issue in dispute; the litigant must have a close relation to the  
 19 third party; and there must exist some hindrance to the third party's ability to protect his or  
 20 her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citations omitted). Here,  
 21 Defendants argue, "even assuming Plaintiff were able to meet the first two elements," she  
 22 cannot meet the third element because her "son's ability to vindicate his own constitutional  
 23 rights is unhindered," as evidenced by the fact that he "availed himself of the prisoner  
 24 grievance process and is involved in a federal civil rights lawsuit." Mot. at 9.

25 But as Defendant's seem to understand, Plaintiff does not seek to vindicate her son's  
 26 rights *on his behalf*.<sup>18</sup> Rather, Plaintiff's First Amendment retaliation claims are two-fold,

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*See supra* n.15.

<sup>18</sup> *See* Mot. at 9 ("Plaintiff claims that Defendants retaliated against her for her son's

1 but in either event predicated upon retaliation *she herself suffered*. First, Plaintiff brings a  
 2 claim for retaliation against her for *her own conduct*, based on Defendants' attempts to  
 3 hinder her First Amendment right to petition the government.<sup>19</sup> Opp'n. at 7. Defendants  
 4 do not appear to challenge the sufficiency of the FAC's allegations as to this first avenue  
 5 for a First Amendment retaliation claim. Second, Plaintiff brings a claim for retaliation  
 6 against her for *her son's conduct*, based on what she believes were retributory actions  
 7 against her for her son's prison grievances.<sup>20</sup> *Id.* It is this second avenue for a First  
 8 Amendment retaliation claim that Defendant argues is insufficiently pleaded.

9 Plaintiff's counsel confirmed at the January 11, 2016 hearing that this second  
 10 avenue sounds in "associational retaliation"; in other words, Plaintiff seeks redress for  
 11 retaliation she suffered as her son's "associate" for his prior protected speech, not redress  
 12 for retaliation he suffered for that speech. The *Powers* third-party standing test is therefore  
 13 irrelevant in understanding the legal sufficiency of plaintiff's "associational retaliation"  
 14 claim, as Plaintiff is not attempting to bring an action on behalf of any third party.  
 15 Unfortunately, however, Plaintiff has provided no legal authority to test the sufficiency of  
 16 her "associational retaliation" claim, despite being specifically asked at the January 11,  
 17 2016 hearing to provide legal authority to support such a claim. And *Powers* is the only  
 18 case cited in Plaintiff's opposition briefing for the retaliation claim based on her son's  
 19 conduct. Opp'n at 7. *Powers* is therefore the only available authority for assessing the  
 20 claim, and under that test, the Court agrees with Defendants that the claim fails because  
 21 Plaintiff's son has clearly demonstrated his "ability to protect his [] own interests."  
 22 *Powers*, 499 U.S. at 411.

23 Accordingly, the Court hereby DISMISSES Plaintiff's First Amendment retaliation  
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25 protected First Amendment activities.") (emphasis added).

26 Specifically, the FAC alleges "Defendants (including Does 1-50) threatened that if  
 27 Plaintiff complained about her mistreatment, false arrest and unlawful searches, she would  
 never see her son again," and that this represented an "attempt[] to chill her First  
 Amendment right to petition the government for redress of grievances." FAC ¶¶ 41, 64.

28 Specifically, the FAC alleges that "Defendants improperly retaliated and  
 discriminated against [Plaintiff] based on her son's filing of prison grievances and appeals,  
 which is protected First Amendment activity." *Id.* ¶ 65.

1 claim that is based on *her son's conduct* (FAC ¶ 65).<sup>21</sup> But dismissal shall be WITHOUT  
 2 PREJUDICE, as the Court is not convinced that an "associational retaliation" claim is  
 3 impossible on these or similar facts. Should Plaintiff elect to continue with such a claim,  
 4 she should be prepared to provide legal authority to support the claim, such that the Court  
 5 may properly address the sufficiency of the factual allegations on any subsequent  
 6 dispositive motions.

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8 **VI. The First Amendment claim for free exercise of religion must be  
 9 dismissed for failure to state a claim.**

10 Finally, Defendants argue that Plaintiff's First Amendment free-exercise claim  
 11 should be dismissed for failure to state a claim. Mot. at 10.

12 " 'Official action,' either through the passage of a facially discriminatory law or  
 13 through the application of a neutral law in a discriminatory manner, violates the free  
 14 exercise clause when the 'object or purpose of [that action is] suppression of religion or  
 15 religious conduct.' " *Turner v. Oakland Police Officers*, No. C 09-03652, 2010 WL  
 16 234898, at \*2 (N.D. Cal. Jan. 14, 2010) (citing *Church of Lukumi Babalu Aye v. City of*  
 17 *Hialeah*, 508 U.S. 520, 533 (1993)). "[T]o merit protection under the free exercise clause  
 18 of the First Amendment . . . the claimant's proffered belief must be sincerely held . . . and  
 19 the claim must be rooted in religious belief." *Id.* at \*2 (quoting *Callahan v. Woods*, 658  
 20 F.2d 679, 683 (9th Cir. 1981)). In *Turner*, for example, the court dismissed an arrestee's  
 21 claim that the seizure of his "blessing oils" violated his right to practice his religion,  
 22 because the "complaint provide[d] no factual allegations supporting . . . that the arrest did,  
 23 in fact, interfere with his religious practices," and "the pleadings [did] not describe

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26 <sup>21</sup> This ruling supplants the Court's prior ruling, in Section III above, that Defendants'  
 27 third argument did not require dismissal of Plaintiff's second retaliation claim (*id.* ¶ 65) *as*  
 28 *against the Does*. Because Defendant's fourth argument – as captured in this section –  
 challenges the sufficiency of the alleged conduct underpinning Plaintiff's second  
 retaliation claim, rather than just the identity of the alleged wrongdoer, this argument  
 requires dismissal against all potential Defendants, including the Does, because no claim is  
 plausibly stated.

1 plaintiff's religion, his religious practices, or the role blessing oil plays in the religion." *Id.*

2 Plaintiff's theory for her free exercise claim is that Defendants' derogatory  
 3 comments about her religion are enough on their face to "support a claim that Defendants'  
 4 unlawful animus toward Muslims was a substantial factor motivating the cruel and  
 5 unlawful treatment of Plaintiff." Opp'n at 8. These comments included:

6 "What kind of Muslim are you – Sunni or Shia?"  
 7 "What mosque do you go to?"  
 8 "Do you pray five times a day?"  
 9 "If you are a Muslim, why don't you cover yourself?"  
 10 "All Muslims are terrorists."  
 11 "America is no place for Muslims."

12 FAC ¶ 31.

13 Even taken as true, however, these comments – as deplorable as they may be – are  
 14 insufficient on their own to state a claim that Defendants acted with the object or purpose  
 15 of suppressing Plaintiff's religion or religious practice. The FAC provides no factual  
 16 allegations about what religious practice the comments could have even interfered with,  
 17 given that Plaintiff was not present at SVSP to exercise her religion.<sup>22</sup> And though the  
 18 comments certainly sound discriminatory, Plaintiff has a pending Equal Protection claim  
 19 aimed at redressing such discrimination. *See id.* ¶ 62. The comments alone therefore do  
 20 not represent "enough facts to state a claim to relief that is plausible on its face" for a First  
 21 Amendment–free exercise violation. *Twombly*, 550 U.S. at 570.

22 Accordingly, Defendants' motion to dismiss Plaintiff's free exercise claim (FAC ¶  
 23 63) is GRANTED.<sup>23</sup> As it is not clear that amendment could not possibly cure these  
 24 defects, dismissal shall be WITHOUT PREJUDICE. *Steckman*, 143 F.3d at 1296.

25 <sup>22</sup> At the January 11, 2016 hearing, Plaintiff's counsel argued that derogatory  
 26 comments alone can "chill" a religious practice – even where no specific practice or  
 27 conduct is interfered with – by likening Plaintiff's treatment at SVSP to the Yellow Stars  
 28 that members of the Jewish faith were forced to wear throughout Nazi-occupied Europe. If  
 Plaintiff intends to continue pursuing this theory, she shall be prepared to defend it with  
 legal authority on any subsequent dispositive motions.

<sup>23</sup> For the same reasons discussed above (*see supra* n.21), this ruling supplants the  
 Court's prior ruling in Section III that Defendants' third argument did not require dismissal

1 **CONCLUSION**

2 For the foregoing reasons, Defendants' motion to dismiss is GRANTED, as  
3 follows: all claims against Defendant Beard are DISMISSED WITH PREJUDICE; all  
4 claims against Defendants Lopez, Wilson, and DeAnzo are DISMISSED WITHOUT  
5 PREJUDICE; the Fourth Amendment claim for unlawful search (second cause of action) is  
6 DISMISSED WITHOUT PREJUDICE except as against Defendants Alonzo, Lyons, and  
7 the Does; the Fourth Amendment claim for unlawful seizure (first cause of action) and  
8 Fourteenth Amendment claim for equal protection (FAC ¶ 62) are DISMISSED  
9 WITHOUT PREJUDICE except as against the Does; and the First Amendment claim for  
10 retaliation based on Plaintiff's son's conduct (*id.* ¶ 65) and the First Amendment free-  
11 exercise claim (*id.* ¶ 63) are DISMISSED WITHOUT PREJUDICE in their entirety.

12 Should Plaintiff elect to file an amendment to the FAC curing the deficiencies  
13 identified herein, she shall do so by February 12, 2016. Failure to file a timely amended  
14 complaint shall result in dismissal of all claims with prejudice.

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16 **IT IS SO ORDERED.**

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18 Dated: 01/29/16

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28 THELTON E. HENDERSON  
United States District Judge

of Plaintiff's free exercise claim *as against the Does*. That claim is now DISMISSED  
WITHOUT PREJUDICE as against all Defendants, including any Does.